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In The

Supreme Court of the United States

October Term, 1991

JANET METZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In deciding whether petitioner's full performance of a real estate agreement vested her with a property interest in decedent's home to which the government's estate tax lien could not attach, did the lower court err in refusing to certify to the Supreme Court of Kansas the governing issue of state property law, and in *sua sponte* relying on a 1915 Kansas decision construing an inapplicable Kansas statute long since repealed, which neither respondent nor petitioner nor the district court had cited?

2. What factors must be considered by a federal court in deciding whether to certify a governing question of state property law to the state supreme court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Janet Metz prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings; in particular, that court's denial of petitioner's motion to certify to the Supreme Court of Kansas the governing issue of state property law.

OPINIONS BELOW

The opinion of the Court of Appeals on the merits (933 F.2d 802) is set forth at page A1 of the Appendix, infra. The court's denial of the motion to certify the state

law questions and denial of the petition for rehearing is at page A13. The district court's decision, and order denying petitioner's motion to alter and amend, are set forth on page A14 and A30 of the Appendix.

JURISDICTION

The opinion of the Court of Appeals on the merits was entered on May 6, 1991. A motion to certify the governing state law question to the Supreme Court of Kansas was filed on May 17, 1991; and a petition for rehearing was filed the same date. The motion and the petition were denied on July 2, 1991. The Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES AND RULES INVOLVED

The Kansas version of the Uniform Certification of Questions of Law Act, K.S.A. 60-3201, et seq., is reproduced in the Appendix, infra, pages A33-A36.

Rule 27.1 of the local rules of the United States Court of Appeals for the Tenth Circuit, entitled "Certification of Questions of State Law", is reproduced in the Appendix, page A37.

The federal estate tax lien statute, 26 U.S.C. § 6324, and the federal estate tax statute, 26 U.S.C. § 2033, are reproduced at pages A38-A41 of the Appendix. Sections 2036 and 2037, relied on by the government on appeal,

after disclaiming their applicability in the district court, are reproduced at pages A41-A42 of the Appendix.

The Kansas inheritance tax statute repealed in 1978, Sec. 1, Ch. 357, Laws of Kansas 1915, construed by the court of appeals, is reproduced in the Appendix, page A43. The present Kansas estate tax statute in effect during the period relevant to this case [K.S.A. § 79-1547], is reproduced at page A43 of the Appendix.

STATEMENT OF THE CASE

Janet Metz brought this action in the United States District Court for the District of Kansas, seeking to quiet title to her home against a claim by the United States that it held an estate tax lien authorizing foreclosure and judicial sale. The district court had jurisdiction under 28 U.S.C. §§ 2410, 1340 and 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

In 1976 Janet Metz, who lived in California with her two daughters, entered into a written contract with her former husband's grandfather, D. Otis Metz, who lived in Kansas, agreeing to sell her California residence and move to Kansas to care for Mr. Metz fulltime in his home for the rest of his life. The written contract required Mr. Metz to make a codicil to his will leaving her the Metz house and its contents. The Kansas attorney for Mr. Metz assured her in writing before she proceeded that her written contract was specifically enforceable. (Pls. Motion for Summary Judgment, Exs. B and D).

Janet Metz continually cared for the ailing Mr. Metz for four years until his death in 1980. He had made a codicil to his will leaving the house to Janet, reciting that the codicil was made "to carry out the terms of my written agreement with her." All taxes applicable to the transaction were to be paid by his estate. Pursuant to the codicil, the Kansas probate court on November 5, 1985, transferred legal title to the home to Janet Metz. Janet and her two daughters have lived in the home since 1976, and since 1980 have maintained it and paid the property taxes. (Pretrial order pp. 6-8, Dkt. No. 27).

The D. Otis Metz estate filed a federal estate tax return on December 11, 1980, listing total assets valued at $2,986,275, of which $1,976,112 represented stock in the J.W.Metz Lumber Company. The estate paid federal estate taxes of $342,975 on the value of all assets other than the stock. The estate had listed the Metz home as an asset, so that the tax payment included estate taxes on the value of the home. But the tax on the stock value was deferred to be paid in installments over a ten year period. The estate paid interest on the $699,185 unpaid tax liability from 1980 to 1984, but never paid any of the principal balance. The J.W.Metz Lumber Company took bankruptcy at that time, rendering the company stock, including the estate's stock previously valued in the estate tax return at almost $2 million, totally worthless. As a result, the D. Otis Metz estate was unable to pay the balance of its estate tax liability. (Pretrial Order pp. 9-11, Dkt. No. 27).

In 1987 the government asserted statutory liens against the Metz home, including an estate tax lien under 26 U.S.C. § 6324, which arose when D. Otis Metz died in 1980. (Pretrial Order p. 13, Dkt. No. 27). This lien attaches

to property owned by decedent at the time of death. The lien cannot attach to any property interests of other parties, and therefore could not attach to the home to the extent that Janet held a property interest by virtue of her performance of the written agreement with D. Otis Metz. Whether Janet was vested with a property interest is governed by Kansas law where the real estate is located. *United States v. Rodgers*, 461 U.S. 677, 683 (1983).

The State-Law Issue

Kansas follows the settled rule of property law that the vendee in a real estate contract becomes the equitable owner of the land when he begins performance, prior to the later transfer of legal title. Accordingly, the vendee's beneficial property interest is not subject to the Kansas inheritance tax. *Frisbie v. Director of Taxation*, 1 Kan.App.2d 416, 566 P.2d 29 (1977). Janet Metz therefore filed this suit, asserting that this doctrine of "equitable conversion" was applicable to her written contract and her performance under it. She had fully and faithfully performed the contract giving full and adequate consideration, so that she was the equitable owner of the entire property interest in the home at or prior to the time of death. The Metz estate merely held legal title in trust for Janet, the true owner.

The District Court Decision

The district court decreed foreclosure of the government lien on the Metz home, thereby permitting the government, which had already been paid estate taxes on the home, to sell it for the unpaid taxes on the Metz

Lumber Company stock which had turned out to be worthless. The district court declined to apply the Kansas cases holding that the vendee under a written real estate contract was the equitable owner under the doctrine of equitable conversion on the ground that those were "real estate installment contracts" providing for transfer of title by deed rather than by will. The court held that since D. Otis Metz had executed a codicil transferring the home to Janet in return for her services there was no need for a decree of specific performance. (A25). The court's faulty rationale nullified the general rule that when a vendee has a *right* to specific performance, there is an equitable conversion vesting the beneficial property interest in the vendee, with the vendor merely holding legal title in trust. III American Law of Property §§ 11.22, 11.24, pp. 62-63, 66-67 (A.James Casner, Editor-in-Chief, 1952). The court thus confused the right to specific performance with the breach of that right.

The Court of Appeals' Decision

Petitioner appealed to the court of appeals, citing Kansas cases holding that Janet's written agreement to acquire land in exchange for her services contract was indeed subject to specific performance imposing a trust on the property for her benefit. *Anderson v. Anderson*, 75 Kan. 117, 88 P. 743 (1907); *Dillon v. Gray*, 87 Kan. 129, 123 P. 878 (1912); *In re Estate of Billinger*, 208 Kan. 327, 491 P.2d 924 (1971). Kansas follows the generally accepted American rule that agreements thus subject to specific performance give rise to an equitable conversion of the

real property interest to the vendee.[1] No Kansas case was cited to the Court which limited the well-established doctrine to "real estate installment contracts."

The government, in response, found it necessary to switch horses in the middle of the stream by arguing for applicability of 26 U.S.C. §§ 2036 and 2037 which it had expressly represented to the district court were inapplicable.[2] These statutes apply in defined circumstances to the extent a party has not given full and adequate consideration for property, an issue never decided by the district court.

The court of appeals first held that petitioner would not be estopped or bound if the D. Otis Metz estate had erroneously listed the home as part of the gross estate. But it then took an approach not suggested by either party, by *sua sponte* citing as governing Kansas authority a 1915 Kansas case, *State v. Mollier*, 96 Kan. 514, 152 P. 771

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[1] Kansas cases "show a clear trend to follow the general rule of law and apply equitable conversion." *In re Estate of Hills*, 222 Kan. 231,238, 564 P.2d 462 (1977). The general rule is that under a services contract like petitioner's, the parties "occupy the positions of vendor and purchaser." Legal title is held by the vendor or his heirs in trust. III American Law of Property, Sec. 11.19, pp. 49-50. Equitable conversion occurs under a contract when there is a right to specific performance. III American Law of Property §§ 11.22, 11.24.

The vendor's creditors have no right to reach the vendee's equitable ownership. III American Law of Property, § 11.29, pp. 82-85.

[2] In its Reply Memorandum, p. 9, Dkt. No. 26, March 23, 1989, the government expressly disclaimed the applicability of "Code Sections 2034-2042."

(1915). *Mollier* construed a Kansas inheritance tax statute later repealed in 1978, imposing a tax on any property passing by will. In *Mollier*, the state assessed an inheritance tax on the transfer of the home by will to a niece who had cared for decedent under a written contract. *Mollier* held that the Kansas inheritance tax statute was a transfer tax. It thus imposed the state tax on any transfer of title by will without regard to the equitable property rights of the transferee and without regard to whether the transferee had paid full and adequate consideration for the property. But the court of appeals decided that since *Mollier* rejected the transferee's argument that the state inheritance tax should not be imposed on her equitable property interest, that she had no property interest at all! Yet *Mollier* specifically noted her "vested interest", but held that the tax was *not* on the property, but upon the transfer. (96 Kan. at 519, 152 P. at 773).

The court of appeals decided that its construction of *Mollier* should then be applied to the new Kansas estate tax statute enacted in 1978, which imposes estate taxes only on "the value of all property to the extent of the interest therein of the decedent" at the time of death. K.S.A. 79-1547, A43, infra. It thereby announced a rule of Kansas property law that a person with a fully performed written contract to acquire a home, in return for personal services constituting full and adequate consideration, has neither an equitable nor legal property interest in the home which she can enforce.

This quite remarkable, new and unexpected theory which nullifies the general rule vesting an equitable property interest in the vendee whose agreement is subject to specific performance, led petitioner to file a motion

to certify the Kansas property law question for decision by the Supreme Court of Kansas, along with a petition for rehearing. The motion and the petition were denied without comment on July 5, 1991.

REASONS FOR GRANTING THE WRIT

I. This Court Should Define the Factors to be Considered by Federal Courts in Deciding Whether to Certify Governing State-Law Issues to State Supreme Courts, Because Conflicts have Resulted From the Lack of Uniform Guidelines

Lehman Brothers v. Schein, 416 U.S. 386 (1974), gave strong encouragement to courts of appeal to use available state certification procedures. This Court remanded the case to the court of appeals to reconsider its refusal to certify a governing state-law issue to the Florida Supreme Court. There, as in the present case, petitioner had found it necessary to first request certification to the state supreme court with its petition for rehearing in the court of appeals. While the certification procedure was not "obligatory", it was strongly recommended:

> . . . It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, . . . (416 U.S. at 390-91).

The ensuing certification to the Florida Supreme Court, after remand by this Court, caused the court of appeals to reverse its earlier decision of the state-law question. *Schein v. Chasen*, 519 F.2d 453 (2nd Cir. 1975). While *Lehman* was clear direction to the courts of appeal to "look favorably" on the use of certification procedures, there was "little guidance" as to when certification should be used. 1A Moore's Federal Practice § 0.203[5], p. 2159 (Second Edition, 1991).

When *Lehman* was decided in 1974, only eleven states had adopted certification procedures available to federal courts. *Lehman*, 416 U.S. at 390, n. 7; 17A Wright, Miller, Cooper, Federal Practice and Procedure § 4248, p. 167. Today, at least thirty-eight states and territories have the procedure available, of which thirty (including Kansas) have enacted, with variations, the Uniform Certification of Questions of Law Act. 17A Wright, Miller, Cooper, Federal Practice and Procedure, p. 167; 12 Uniform Laws Annotated, 1991 Supp. p. 19.

The result of *Lehman*, and the ensuing expansion in the number of states adopting the procedure, has been a proliferation of cases in which certification of state-law questions has been considered by courts and requested by parties. West's Federal Practice Digest 4th, Federal Courts, Key No. 392.

Following this Court's lead in *Elkins v. Moreno*, 435 U.S. 647, 662 (1978), courts frequently find it appropriate to certify, on their own motion, state-law issues to state courts when state law may be determinative in the case. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400, 1402 (9th Cir. 1990); *Retail Software Services, Inc. v. Lashlee*,

838 F.2d 661 (2nd Cir. 1988); *Delahanty v. Hinckley*, 845 F.2d 1069 (D.C.Cir. 1988). And see, *Virginia v. American Bookseller's Assn.*, 484 U.S. 383, 395-96 (1988).

Yet, with few exceptions, there has been an absence of criteria considered and applied in deciding whether to certify state-law issues. The Fifth Circuit has had the most experience with certification, embracing the procedure with some enthusiasm after being proved wrong about state-law issues a number of times. *Lehman, supra,* at 390, n. 6. In *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), *cert. denied*, 429 U.S. 829, the following factors were thought to be significant: the closeness of the question and the existence of sufficient sources of state law to allow a principled rather than conjectural conclusion; considerations of comity, the length of delay, and the nature of the issue. Cf., *Dorman v. Satti*, 862 F.2d 432 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1099.

Examples of apparent conflict with the practice of the Second, Ninth and District of Columbia Circuits in this rapidly developing area of federal procedure are *New Mexico ex rel. Reynold v. Molybdenum Corp. of America*, 570 F.2d 1364, 1367 (10th Cir. 1978), *Armijo v. Ex Cam Inc.*, 843 F.2d 406 (10th Cir. 1988); and *Perkins v. Clark Equipment Co., Melrose Div.*, 823 F.2d 207 (8th Cir. 1987). These cases state that certification after a district court has decided a case should be denied outright, or granted only in "limited circumstances", even though governing state-law issues often become distilled as determinative of the case on appeal. And the First Circuit generally denies certification to a party who chooses to invoke federal diversity jurisdiction, as though a party's exercise of a

federal right should be a significant factor in avoiding certification which might otherwise be determinative of the case. *Fischer v. Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018, and cases cited.

The Tenth Circuit along with other federal courts has apparently not yet come to grips with the fact that certification at the appellate level is a "minimal incursion on federal jurisdiction", thus deserving careful consideration at that level. 1A Moore's Federal Practice Sec. 203[5], p. 2162.[3]

An enlightened use of certification by the District of Columbia Circuit in *Delahanty v. Hinckley*, 845 F.2d 1069 (D.C.Cir. 1988), permitted the District's Court of Appeals to decide whether it would adopt a new theory of "Saturday Night Special" handgun liability. Judge Starr, concurring, thought it better not to "persist in our course of speculation", and that certification was "the more orderly, and appropriately deferential course" to take. Cf., *Eli Lilly and Co. v. Home Ins. Co.*, 764 F.2d 876 (D.C. Cir. 1985).

The Tenth Circuit's experience in wrongly deciding difficult state-law property issues in federal tax cases vividly demonstrates the particular need for certification in such cases. In *Collins v. Commissioner*, 393 U.S. 215 (1968), this Court vacated 388 F.2d 353 (10th Cir. 1968), in

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[3] In two of its earlier cases, however, the Tenth Circuit did certify state-law questions on its own motion. *Krutsinger v. Mead Foods, Inc.*, 546 F.2d 328 (10th Cir. 1976); *Parcell v. Governmental Ethic's Com.*, 626 F.2d 160 (10th Cir. 1980).

light of an intervening Oklahoma Supreme Court decision disagreeing with the Tenth Circuit's decision as to a property interest under Oklahoma law. The Tenth Circuit on remand accepted the conflicting Oklahoma decision and held the event in question to be nontaxable. A similar problem occurred in *Pulliam v. Commissioner*, 329 F.2d 97 (10th Cir. 1964), *cert. denied*, 379 U.S. 836. The court's decision as to Colorado property law was in error, as noted by a later case wherein the district court wisely utilized the certification procedure. *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975).

Finally, our nation's need for a "cooperative judicial federalism" announced by *Lehman* (416 U.S. at 391) was repeated and applied by this Court in *Salve Regina College v. Russell*, ___U.S.___, 111 S.Ct. 1217 (March 20, 1991). The requirement that federal appellate courts review state-law decisions of district courts *de novo* is a significant step toward insuring the correct application of governing state laws to the rights of our citizens in federal courts. Another important step toward that goal will be the consistent, uniform utilization of certification procedures now widely available to the federal courts of appeal.

II. This Case Presents a Sound Basis for Announcing Appropriate Factors in Certification Cases. The Court of Appeals Abused its Discretion in Refusing to Certify to the Supreme Court of Kansas the Issue of Petitioner's Property Interest in the Home She Earned.

In the present case, the state-law issue was whether the doctrine of equitable conversion was applicable. This

is because the government's lien could only attach to the property interest of the decedent at the time of death. If Janet had the beneficial property interest and the estate held legal title in trust, then Janet's ownership was free of any lien.

There can be no federal tax lien or estate tax on property beneficially owned by another, though the estate holds legal title in trust. *Reed v. Commissioner*, 36 F.2d 867 (5th Cir. 1930); *Stansbury v. United States*, 543 F.Supp. 154 (N.D.Ill. 1982), *aff'd*, 735 F.2d 1367 (7th Cir. 1984); *Estate of Whitt v. Commissioner*, 751 F.2d 1548, 1556 (11th Cir. 1985), *cert. denied*, 474 U.S. 1005. ("It is equitable ownership, rather than legal title which is taxed.") Conversely, the government tax lien on property of the *vendee* will, under the doctrine of equitable conversion, attach to his equitable ownership of land although the vendor retains legal title. *United States v. Big Value Supermarkets, Inc.*, 898 F.2d 493 (6th Cir. 1990).

On appeal, the government was squarely faced with the Kansas cases giving Janet the right of specific performance in the event of breach, and the general rule followed in Kansas that such right is the test for equitable conversion. So the government sought to avoid the consequences of an equitable conversion by changing its position on appeal. In the district court it had expressly disclaimed the applicability of 26 U.S.C. §§ 2036 and 2037. Those statutes require the value of property *not owned by decedent* to be included in an estate for tax purposes, to the extent that full and adequate consideration was not given by the vendee, under specified circumstances. Rather, the government had relied on Section 2033 which includes only the value of all property "to the extent of

the interest of decedent at the time of his death." On appeal, the government argued at length that Sections 2036 and 2037 applied.

The court of appeals solved the government's problem by unearthing, and *sua sponte* relying on its construction of, the early Kansas case, *State v. Mollier*, 96 Kan. 514, 152 P. 771 (1915), which none of the parties nor the district court had mentioned or considered applicable. *Mollier* held that the Kansas inheritance tax act taxed the transfer of title – legal title – to property regardless of beneficial ownership by the vendee under a written services contract like that of Janet Metz in our case. But the court of appeals construed *Mollier* as holding that the state tax was on the "property" itself, and was thus a holding that the vendee had no beneficial ownership at all. This was despite *Mollier's* recognition of the vendee's "vested interest".[4] The court then completed its faulty syllogism by holding that the repeal of the inheritance tax transfer statute was irrelevant because the new estate tax statute on the value of property "to the extent of the interest therein of the decedent" at time of death also taxed property, not its transfer. Therefore, according to the court, Kansas law gave Janet no beneficial interest in

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[4] The court of appeals also relied on a sentence from *Mollier* citing *Schoonover v. Schoonover*, 86 Kan. 487, 121 P. 485 (1912), to the effect that the vendee's rights under a services contract were subject to the estate's creditors. This sentence from *Mollier* was in reality part of the State's contention, which incorrectly stated the holding of *Schoonover*. No such holding was made or suggested by *Schoonover*, which simply affirmed the trial court's enforcement of an oral services agreement against the heirs of decedent.

the Metz home although she had fully performed a difficult long-term services contract.

By this misapplication of a 1915 Kansas decision construing a tax statute long since repealed, the court concluded that no beneficial property right ever vested in Janet. The Kansas rule granting the right of specific performance, which in turn made the estate a mere trustee of legal title for Janet's benefit, was thus indirectly circumvented so as to validate the government's foreclosure and sale of her home.

Never having had any reason to brief the inapplicability of *Mollier*, Janet filed a petition for rehearing and a motion to certify the state property law question to the Kansas Supreme Court. That petition pointed out that (1) the former Kansas inheritance tax act was indeed a *transfer* statute which *Mollier* construed as applicable to any legal title transfer pursuant to a will; (2) that ensuing Kansas regulations implemented that construction by giving controlling tax consequences to legal title, not to beneficial ownership [L. Franklin Taylor, "The 1978 Kansas Inheritance Tax Act," 27 Kan.L.Rev. 593, 597-598 (1979)]; (3) that the Kansas Department of Revenue's reliance on its regulations had been rejected by a recent Kansas decision applying the doctrine of equitable conversion [*Frisbie v. Director of Taxation*, 1 Kan.App.2d 416, 566 P.2d 29 (1977)]; and (4) that thereafter the old Kansas transfer statute was repealed, being replaced by an estate tax imposed only on the interest of the decedent at time of death – not on the transfer of title pursuant to a will.

Petitioner also noted, in her rehearing petition, that Washington and California had initially followed *Mollier*

in construing similar inheritance tax "transfer" statutes. But these state courts overruled those decisions without a statutory change by the legislature – because it made no sense to hold that a creditor or vendee must pay a tax if his obligation is paid by transfer pursuant to a will, but need not pay the tax if paid as an obligation of the estate pursuant to the original contract or debt itself.[5]

It is impossible to read these cases without realizing that *Mollier*-era decisions simply disregarded the beneficial ownership of property for purposes of imposing a tax on a transfer pursuant to a will, under these old statutes. They did not pretend to hold (contrary to the decision below) that one performing a written contract for full and

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[5] *Estate of Vai*, 52 Cal. Rptr. 705, 417 P.2d 161 (1966), overruling *In re Grogan's Estate*, 219 P. 87 (Cal. App. 1923) [The Grogan-Mollier rule was disapproved, transfer by will of legal title only not taxable]; *In re Estate of McLeod*, 105 Wash.2d 809, 719 P.2d 88 (1986), overruling *In re Estate of Gaudette*, 165 Wash. 412, 5 P.2d 503 (1931)[Beneficial interest of person in a house earned by a services contract whose title was transferred under the will, is not subject to inheritance transfer tax].

Commentators favor exempting such contractual bequests from taxation at least to the extent the transfers represent nongratuitous compensation for actual services rendered. Note, Taxability of Testamentary Transfer Made for Adequate Consideration, 18 Hastings L.J. 440 (1967); Note, Inheritance Tax: Transfer by Contractual Will Not Taxable, 51 Minn. L.Rev. 1175 (1967); Note, State Inheritance Taxation of Nongratuitous Transfers, 43 N.Y.U.L.Rev. 744 (1968). This is based on the equitable property interest vested in the person performing the services.

A federal estate tax does not attach to such an equitable property interest even though legal title may remain in the estate and pass by will. (Page 14, supra).

adequate consideration held no beneficial ownership in the real property whose title was to be conveyed to vendee at death.

What the court of appeals should have done after oral argument, but before it chose *sua sponte* to rely upon its construction of a 1915 case construing a repealed statute, is what the Second Circuit did in *Retail Software Services, Inc. v. Lashlee*, 838 F.2d 661 (2nd Cir. 1988). There, the court entered a simple order certifying the case to the New York Court of Appeals, to wit:

> On consideration of the briefs and records and the oral argument in this appeal, it is hereby Ordered that the Clerk of the Court transmit to the Clerk of the New York Court of Appeals a Certificate in the form attached, together with a complete set of the briefs, appendix, and record filed by the parties with this court.

The attached certificate of the court explained that the New York court should have an opportunity first to interpret the state statute involved, and noted that the question was likely to recur. (838 F.2d at 662).

In the present case, the court of appeals proceeded, without the benefit of briefing by the parties, on its excursion to apply to our different case the old Kansas case construing a repealed Kansas statute. Neither the late Kansas *Frisbie* case rejecting the rationale of *Mollier* and impliedly overruling it, nor other state's overruling of similar old decisions, nor the later Kansas repeal of its former "transfer" statute, deterred the court from enforcing the government lien on petitioner's home.

In the first instance, the court of appeals should have, on its own motion, considered certification to the Kansas

Supreme Court following briefing and argument before the court decided to develop its own theory of Kansas property law. The court assuredly should have considered certification when petitioner filed her later motion to certify along with a petition for rehearing. But so far as we know, the court never considered certification.

The question, therefore, is whether the court should have considered relevant factors and should then have certified the state-law property question to the Kansas Supreme Court. We submit the following relevant factors as appropriate and necessary for consideration before deciding whether to certify state-law issues:

1. *The degree to which considerations of comity are relevant under the circumstances.* In the present case, the state has a high interest and exclusive right to create and define the property rights in land within its borders. Federal estate and income tax laws, and other federal laws including the due process clauses of our Constitution, implicitly recognize that citizen's property rights are defined by state law. To protect those property rights in rendering due process of law, a federal court should be most sensitive to the state's right to decide when a property right vests and what that property is.

2. *Whether the state law question is determinative of the federal case or a significant part of it.* Here the property question determines the entire outcome of the case. Were petitioner to prevail in the Kansas Supreme Court on the property issue, the government lien could not attach under the posture of the case as presented to the district court. The court of appeals would merely need to decide

whether the government was entitled to rely on the theories it had disclaimed in the district court, and if so whether or not a remand to the district court for evidence on those issues would be warranted.

3. *The absence of a controlling precedent, such as a state decision construing an applicable state statute.* Kansas has never construed its current estate tax statute, applicable to the "interest" of a decedent in the property, in remotely comparable circumstances. The 1915 *Mollier* case construed the former statute for purposes of imposing a transfer tax. The 1977 case of *Frisbie v. Director of Taxation*, 1 Kan. App.2d 416, 566 P.2d 29, reversing the Director's decision based on *Mollier*-type regulations, construed the former statute (repealed in 1978) as not applying to the beneficial interest of a real estate vendee who had paid a fraction of the purchase price by the date of death.

4. *The existence of other sources of state law which allow a principled and firm conclusion, as contrasted with opinion involving conjecture.* Absent plain language in the state statute or a state case directly controlling, the property rights of a citizen should not be taken by a federal court drawing debatable inferences from old state decisions and repealed statutes, without certifying the question to the state court for an authoritative and final answer.

5. *What is the impact of delay from the certification process*? The Kansas certification procedure gives first priority to questions of state law certified by federal courts. K.S.A. § 60-3204. The Kansas Supreme Court docket is current. A hearing and decision of a certified question can normally be completed within four months. In this case, if the government prevailed the delay would

only impact the government's time to foreclose and sell petitioner's home, but her supersedeas bond also indemnifies the government for rent from the date of the district court decision. If petitioner prevailed in the state court, her home would be saved and her contract enforced. The balance here also weighs heavily for certification.

6. *Are the questions likely to recur*? Federal tax and eminent domain cases, and diversity cases, involving estates holding legal title in trust for a beneficial owner under a performed contract, are likely to recur from time to time indefinitely into the future.

While two of the panel members of the court of appeals are from Kansas, and the learned court's solution rescuing the government from defeat was ingenious, the truth remains that a "cooperative judicial federalism" should permit the state to decide for itself when equitable property interests vest under fully-performed written agreements. However "correct" a federal court may consider its result to be, it is the state's prerogative to decide cases of first impression construing new state statutes and the vesting of equitable property rights under such agreements.

CONCLUSION

As the matter now stands, state-law issues are being considered for certification erratically and inconsistently. In some instances, as in this case, a court may not consider certification at all even when the unresolved nature of a property right literally cries out for authoritative

resolution by the highest state court. This Court's guidance is needed for uniform and consistent use of the certification procedure now available from the highest court of most states.

The Petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

90-3050

JANET METZ, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	)	On Appeal From The United States District Court For The District Of Kansas (D.C. No. 88-1271-C)

(Filed May 6, 1991)

Gerald Sawatzky of Foulston & Siefkin, Wichita, Kansas, for Plaintiff-Appellant.

Joan I. Oppenheimer, Attorney, Tax Division, Department of Justice, Washington, D.C. (Shirley D. Peterson, Assistant Attorney General, Gary R. Allen and William S. Estabrook, Attorneys, Tax Division, Department of Justice, Washington, D.C., with her on the brief, Lee Thompson, United States Attorney, Wichita, Kansas, of counsel), for Defendant-Appellee.

Before LOGAN, SETH and TACHA, Circuit Judges.

SETH, Circuit Judge.

This dispute centers on the title to a residence at 16 Linden Drive in Wichita, Kansas. The primary issue presented on appeal is whether the property interest in the house was transferred from D. Otis Metz to Janet Metz before or after D. Otis Metz died. The timing is critical because it determines whether the house was properly included in D. Otis Metz's estate.

Janet Metz filed this lawsuit on April 20, 1988 to quiet title in the Linden Drive residence. The Internal Revenue Service (IRS) argued that it has a federal tax lien on the property as part of the estate of D. Otis Metz, the former owner. The district court agreed with the IRS and granted the government's motion for summary judgment. The court found as a matter of law that the Linden Drive house was owned by D. Otis Metz at the time of his death and was properly included in his estate. When the estate defaulted on its tax payments, the IRS could foreclose on the house. The court affirmed its ruling in a subsequent motion made by Janet Metz to alter or amend the judgment against her.

On appeal, Janet Metz argues that the district court erred in ruling that a lifetime service contract made in exchange for property does not transfer title to the property by equitable conversion at the time the parties enter into the contract. Metz's theory is that she obtained title by equitable conversion in October 1976 when she agreed to the terms of the contract. The government contends that the contract was not enforceable until D. Otis Metz died in March 1980. And, because Mr. Metz held legal title at his death the house was properly included in the

Metz estate. While we certainly sympathize with the predicament Janet Metz is in, for the reasons that follow we must affirm the decision of the trial court.

In October 1976, Janet Metz was living with her two daughters in California when she received an offer from D. Otis Metz, the grandfather of her ex-husband. Mr. Metz offered to add a codicil to his will leaving his house in Wichita, Kansas to Janet in exchange for Janet's promise to move into the house and care for him until his death. Mr. Metz was 91 years old when the offer was made.

Janet Metz accepted the offer and signed a letter agreement on October 18, 1976. She sold her house in California and moved into the house in Wichita. On November 29, 1976, pursuant to the terms of the agreement, Mr. Metz executed a codicil to his will leaving the house to Janet. His stated reasons for doing so were his "great love and affection for Janet Metz" and the fact that Janet, by moving in with him, had complied with the terms of the contract. The codicil further declared:

> "It is my desire that my executor transfer the property to Janet Metz as quickly as possible after my death and that any taxes of any kind, inheritance taxes or otherwise, occasioned by these specific bequests shall be paid by my estate and shall not be charged to the specific devisees named above."

Janet Metz and her daughters lived with Mr. Metz until he died on March 11, 1980.

Mr. Metz's will was admitted to probate and the court valued the total assets of the estate at $2,986,275.01, which consisted of $2,384,320.50 worth of stock and notes

receivable held in the J. W. Metz Lumber Company. The Linden house, valued at $250,000.00, was included in the estate without objection by appellant.

On February 16, 1981 the Internal Revenue Service assessed the estate $1,042,160.94 in estate taxes. The estate immediately paid $342,975.00. The IRS, acting pursuant to 26 U.S.C. § 6166, granted the estate's petition to defer payment of the remaining $699,185.77. The deferred amount was to be paid in ten installments beginning December 11, 1985. Between 1981 and 1985, the estate paid $276,670.97 in interest on the deferred taxes.

During the interim before the first installment came due, the J. W. Metz Lumber Company experienced financial difficulties. On October 31, 1984, an agreement was entered into between the estate and the lumber company to reorganize the company's capital structure. Under the agreement, the estate could redeem preferred shares in the company to obtain the funds necessary to make the tax payments.

The attempted reorganization failed and the lumber company declared Chapter 7 bankruptcy. The shares of stock held by the estate lost their value making payment of the December 11, 1985 tax installment impossible.

The probate court authorized distribution of the Linden Drive house to Janet Metz. Before the IRS accelerated collection of the outstanding taxes, the executor of the estate petitioned and received a Decree of Final Settlement from the probate court. The Decree found that the estate had no property with which to make further payments on the deferred portion of the federal estate tax.

On January 12, 1987, the IRS accelerated the deferred estate tax payments and demanded payment of the entire amount owed plus penalties and interest. The IRS claims it has valid liens totaling $990,432.99 as of June 1, 1988. The government seeks to collect part of the outstanding taxes owed by foreclosing on the Linden Drive house.

In reviewing the district court's grant of summary judgment, we review the evidence and any possible inferences from the evidence in the light most favorable to the party opposing the motion. Laidley v. McClain, 914 F.2d 1386, 1390 (10th Cir.). Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."

Before addressing the merits of appellant's contract argument, it is necessary to consider the effect of appellant's "silent" acceptance of the estate's inclusion of the house in the value of the gross estate. In the federal estate tax return filed on December 11, 1980, the executor of Mr. Metz's estate reported the house, valued at $250,000.00, as part of the total estate. Consequently, a portion of the $1,042,160.00 estate tax charged to the estate represented tax owed on the Linden Drive house. Janet Metz did not object to this transaction. It also appears she chose not to list the value of the house on her individual 1980 income taxes.

The question is whether appellant's "acquiescence" bars her current contract claim. In *Hughes v. Hughes*, the Kansas Supreme Court stated that "[w]e have repeatedly held a devisee must either accept or reject a will as

written and that he cannot accept its benefits and reject its burdens." 107 P.2d 672, 675 (Kan.). The *Hughes* court held that a party who accepted a residuary distribution under a will could not later bring a contract action challenging a provision of the will devising land to another person. The court distinguished its facts from the situation where a party challenges provisions of a will which do not conflict with the benefits they receive under the will. "The fact that a legatee or devisee has accepted the provisions of a will does not estop him from advancing any contention *not inconsistent with the will or his position thereunder." Id.* (quoting 69 C. J. 973, § 2165) (emphasis in original).

By accepting the house under the will, appellant avoided paying personal income tax on the property. From a monetary standpoint she received a benefit from the will – a benefit which Mr. Metz specifically desired her to have. Appellant's case, however, is unlike *Hughes* because appellant is not contesting a provision of the will. She is merely arguing an alternate theory of recovery, which if successful, would *not* alter the rights of any of the other parties to the will.

When appellant accepted the house under the will, there was nothing to indicate that her right to the house under the will was different than her right to the house under the contract. One possible inference is that she made the decision for tax reasons. It is also possible to infer that her decision was made for convenience. Bringing a contract claim for the house most likely would have involved litigation. One can assume, however, that had she known of the future tax problems the estate faced, she would have elected to bring a contract claim to

recover the house. Absent such a knowing election between two distinct options, a party should not be barred from asserting a separate theory of recovery which does not contradict the rights of others in a will. Cf. Wolf v. Rich, 121 P.2d 270 (Kan.) (relief under a contract theory was not allowed when person accepted testamentary benefits with knowledge that the will and the contract were wholly inconsistent).

The next question is whether Mr. Metz possessed a property interest in the Linden Drive house when he died or whether his interest was transferred to appellant through their contract. If the district court was correct in finding that he had a property interest in the house at death, then the IRS can attach a federal tax lien on the property. However, if appellant is correct in stating that the doctrine of equitable conversion gave her legal title when she initiated the contract with Mr. Metz in 1976, then the federal tax lien could not attach to the house.

Although the application of federal liens to property is a question of federal law, determining whether such a property interest exists is done under state law. *See* United States v. Wingfield, 822 F.2d 1466 (10th Cir.). Appellant's argument, therefore, hinges on the Kansas state courts' application of equity law principles to a contract to devise land in exchange for lifetime services.

Appellant attempts to equate her lifetime service contract with an installment purchase agreement arguing that equitable conversion occurs if the agreement is subject to specific performance. Appellant correctly asserts that Frisbie v. Director of Taxation, 566 P.2d 29 (Kan. App.), and Matter of Estate of Hills, 564 P.2d 462 (Kan.),

apply the doctrine of equitable conversion to installment purchase agreements for the sale of real estate. Both cases hold that a real estate contract transfers the seller's interest in the real estate to the buyer when the contract is made, not after all the installment payments are made. The interest retained by the seller is a personal property interest for purposes of inheritance taxes.

Appellant cannot, however, superimpose the rationale of *Frisbie* and *Hills* over the facts of the present case. Under Kansas law, the transfer of property by will in exchange for lifetime service does not transfer title when the contract is made. Kansas cases hold that the transfer of the owner's interest in property occurs when the contract is completed – namely when the owner of the property dies. *See* State v. Mollier, 152 P. 771 (Kan.) (discussed below). If the owner of property were to breach the contract by selling the property during his or her lifetime, the person performing the services would be entitled to the value of the services performed, not to the property itself. *See* In Re Ray's Estate, 306 P.2d 190, 192 (Kan.); Anderson v. Anderson, 88 P. 743, 746 (Kan.).

State v. Mollier typifies these principles. The *Mollier* facts are similar to those now at issue. Louis Mollier, a Catholic priest, entered into an agreement with his niece whereby he would bequeath all his property to her in his will if she agreed to "look after his welfare as long as he lived." His niece moved in with him and cared for him during the remaining twenty years of his life.

When the will was probated, the niece argued that the property she inherited in return for her services was not taxable as part of the estate. Making an argument

identical to that now made by Janet Metz, she claimed she acquired the property from her uncle by contract and "that the will was merely the means agreed upon by which to convey to her the legal title to property which had already become hers when Louis Mollier died." *Mollier*, 152 P. at 771. She based her claim on opinions by the court which applied equity principles to enforce contracts involving the execution of a will. The *Mollier* court cited an excerpt from Schoonover v. Schoonover, 121 P. 485 (Kan.), to demonstrate the doctrine of these cases:

> "Where one has rendered personal services to another under an oral agreement for compensation by the devise of real estate, the contract may be enforced irrespective of the question of possession, where the services are of such a character that their money value cannot be satisfactorily estimated."

Mollier, 152 P. at 772 (quoting *Schoonover*, 121 P. at 486). The niece argued that because the contract was enforceable in equity, she could qualify as a bona fide purchaser for consideration and be exempted from inheritance taxes under the Kansas inheritance statute.

The Kansas Supreme Court disagreed. The statute at issue imposed an inheritance or succession tax on all property

> "which shall pass by will or by the laws regulating intestate succession, or by deed, grant or gift made in contemplation of death, or made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust – except in case of a bona fide purchase for full consideration in money or money's worth."

Mollier, 152 P. at 771 (quoting R. S. 79-1501). The court held that the bona fide purchaser exception applied "solely to transfers by deed or grant." *Id.* at 772. The fact that the twenty years of service might be sufficient consideration under the contract was not relevant to application of the statute.

The court distinguished the niece's case from the *Schoonover* line of cases because the niece's contract with her uncle was properly executed when the transfer of property was included in the will. In addition, although *Schoonover* enforced the contract in equity, the court stated that

> "the property itself [in Schoonover] was subject to probate as belonging to the deceased at the time of his death, and was liable for his debts, and that these were a *lien upon the property prior to any rights of the promisee.*"

Id. (emphasis added). Even personal services contracts enforced in equity are subject to probate.

Although § 79-1501 of the Kansas inheritance laws was repealed in 1978, the *Mollier* rationale is still applicable under the present inheritance statute. *See* Kan. Stat. Ann. § 79-1547 ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time or his or her death."); Kan. Stat. Ann. § 79-1551 (where possession or enjoyment of the property can be obtained only by surviving the decedent, and the decedent retained a reversionary interest, the property is included in the value of the gross estate). *See also* Matter of Estate of Saroff, 625 P.2d 458 (Kan.) (if possession or enjoyment of the property was dependent upon or certain to be delayed until at

or after the death of the grantor, grantor retains an interest requiring inclusion of the property in his estate). The fact that *Mollier* involved application of an inheritance tax instead of an estate tax does not change the effect on Mr. Metz's proprietary interest. Both taxes are imposed after death. *See* Russell v. Cogswell, 98 P.2d 179 (Kan.) (federal estate tax is a tax on the right to transfer property at death and state inheritance tax is a tax on the right of the distributee to receive the property).

Once it is established that Mr. Metz at his death had a proprietary interest in the house, the federal estate tax lien can attach to the property at his death. 26 U.S.C. § 2031 provides that the value of the decedent's gross estate shall include the value of the decedent's real and personal property at the time of death. The estate tax lien under 26 U.S.C. § 6324(a)(1) attaches on the date of death to the value of the gross estate. Because we agree with the district court that the contract created no equitable interest in favor of the appellant until Mr. Metz died, we do not address the government's argument regarding applicability of 26 U.S.C. §§ 2036 and 2037.

Appellant obtained her property interest in the Linden Drive house when D. Otis Metz died, not before. Accordingly, the federal estate tax lien attached to the property. The IRS is entitled to foreclose on appellant's house to recover outstanding estate taxes due on the D. Otis Metz estate.

Appellant does not qualify as a "purchaser" under 26 U.S.C. § 6324(a)(2), exempting her from the lien, because she received the property as a beneficiary. The property was not transferred to her by a surviving tenant, person

in possession, or beneficiary "who receive[d] or ha[d] on the date of the decedent's death, property included in the gross estate. . . . "

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANET METZ, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee.	)	No. 90-3050

ORDER
Filed July 5, 1991

Before LOGAN, SETH and TACHA, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and motion to certify question of law to the Supreme Court of the State of Kansas.

Upon consideration whereof, it is ordered that the petition for rehearing and the motion to certify the question of law to the Supreme Court of Kansas are denied.

Entered for the Court
ROBERT L. HOECKER, Clerk
By: Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JANET METZ,

Plaintiff

Vs. No. 88-1271

UNITED STATES OF AMERICA,

Defendant and Counterclaimant

MEMORANDUM AND ORDER
(Filed Oct 13, 1989)

This case comes before the court on cross motions of both parties for summary judgment. The pretrial conference order filed on April 4, 1989, supersedes all pleadings and controls the subsequent course of this case, including the parties' motions for summary judgment now before the court. The plaintiff has requested oral argument. Since oral argument would not materialiy aid the court in deciding these motions, plaintiff's request for oral argument is denied.

The plaintiff brought this action to quiet title to a residence she owns, against which the government asserts tax liens. The defendant counterclaimed, asking the court to allow foreclosure on the residence in order to collect delinquent estate taxes.

In ruling on a motion for summary judgment, the trial court conducts a threshold inquiry of the need for a trial and grants summary judgment where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986). Essentially, the inquiry is "whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-252. There is no genuine issue for trial unless there is sufficient evidence – significantly probative or more than merely colorable – favoring the nonmoving party for a jury to return a verdict for that party. 477 U.S. at 249. Where there is but one reasonable conclusion as to the verdict and reasonable minds would not differ as to the import of the evidence, summary judgment is appropriate. 477 U.S. at 250.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1" (citation omitted). *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). "The movant must identify those portions of 'the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any' to demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c)." *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342, 345 (10th Cir. 1986), *cert. denied*, 480 U.S. 947, 107 S. Ct. 1605 (1987). There is no requirement in Fed. R. Civ. P. 56 that the moving party negate the opponent's claim. *Celotex*, 477 U.S. at 329. The movant's burden of proving that there is an absence of a genuine issue of material fact "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." 477 U.S. at 325.

For the purpose of ruling on the parties' cross motions for summary judgment, the court finds the following material facts to be uncontroverted:

The plaintiff is the current owner of the residence at 16 Linden Drive, Wichita, Kansas, the legal description of which is Lot 6, Block 3, Forest Hills Addition to the City of Wichita, Sedgwick County, Kansas. The residence was formerly owned by D. Otis Metz, who died testate on March 11, 1980.

In October, 1976, Mr. Metz contracted with the plaintiff for the plaintiff to leave her home in California and move to Wichita, Kansas, with her two minor daughters to reside with Mr. Metz and care for him in his old age, in consideration of which, along with his love and affection for the plaintiff, Mr. Metz agreed to amend his will to provide for the transfer of his residence to the plaintiff upon his death. In reliance on that contract, the plaintiff sold her home in California and moved into Mr. Metz's house in Wichita with her two daughters in 1976. The plaintiff and her children resided with Mr. Metz in his house until his death in 1980, and the plaintiff has continuously resided in the house since that time.

As provided in the contract with the plaintiff, Mr. Metz amended his will on November 29, 1976, through a Second Codicil to provide for the devise of the house located at 16 Linden, Wichita, Kansas. The Second Codicil provided in pertinent part:

> ITEM FOUR: I give, bequeath and devise unto Janet Metz, now a resident of Wichita, Sedgwick County, Kansas, the following residence, to-wit: The home in which I am now living described as 16 Linden, Wichita, Kansas,

legally described as Lot Six (6), Block Three (3), Forest Hills, Sedgwick County, Kansas

. . . .

I make this specific bequest to Janet Metz for the reasons that she is the former wife of my grandson, Joseph William Metz, and is the mother of my great-grandchildren who are the daughters of my grandson, Joseph William Metz. This specific bequest is made for several reasons including the fact that I have great love and affection for Janet Metz and for the further reason that she helped and assisted my wife, Josephine Metz, in her last illness; and for the reason that I agreed in writing with Janet Metz that if she would return from California with her daughters and move into my home in Wichita, Kansas, to help care for me and my needs so long as I shall live that I would, by codicil to my will, leave her my home and its contents subject to the exceptions above stated; that Janet Metz and her daughters have moved to Wichita, Kansas, and are now residing in my home, and Janet Metz is now taking care of my needs, and I make this codicil to carry out the terms of my written agreement with her. It is my desire that my executor transfer the property to Janet Metz as quickly as possible after my death and that any taxes of any kind, inheritance taxes or otherwise, occasioned by these specific bequests shall be paid by my estate and shall not be charged to the specific devisees named above. . . .

Mr. Metz's will was admitted to probate by the Probate Department of the Sedgwick County, Kansas District Court on April 2, 1980. The Estate timely filed the required federal estate tax return on December 11, 1980. For purposes of completing that return, the total assets of the Estate were valued at $2,986,275.01 of which

$2,384,320.50 represented stock and notes receivable in the J.W. Metz Lumber Company. The remaining value of $601,954.51 represented the residence, valued at $250,000, and certain other assets. The total tax liability of the Estate was assessed by the Internal Revenue Service on February 16, 1981, to be $1,042,160.94. The plaintiff does not contest the assessment of the estate tax liability. She is not the taxpayer against whom the estate tax liability was assessed.

The Probate Court authorized the distribution of the house at 16 Linden to the plaintiff in an order dated November 5, 1985, which specifically found as follows:

> Paragraph 15. A Federal Estate Tax Return was duly filed for this Estate and Federal Estate Taxes in the amount of $342,975, representing the taxes assessed on Estate assets (including the real property at 16 Linden, Wichita, Kansas), which were not subject to deferral, were paid on December 11, 1980. The United States Treasury Department issued an Estate Tax Closing Letter, dated June 29, 1982, which is on file herein.
>
> . . . .
>
> Paragraph 17. The Court finds that all Federal and State taxes attributable to the specific devise and bequests have been paid and proof thereof has been duly filed.
>
> Paragraph 18. Petitioner is entitled to receive distribution of said real property and it is in order that the Court direct the executor to transfer the same to Petitioner forthwith.

Because the major asset of the Estate was Mr. Metz's stock ownership interest in the family-owned J.W. Metz Lumber Company, the Estate made a 26 U.S.C. § 6166 election with the filing of the estate tax return to defer

payment of the estate taxes attributable to the value of Mr. Metz's stock ownership interest in that business. The § 6166 election deferred estate taxes in the amount of $699,185.77. This deferred amount was to be paid in ten equal annual installments of $69,918.58, with the first installment to be paid December 11, 1985. During the four year period from 1980 to 1985, the Estate made annual payments of interest on the deferred sum of the total amount of $276,670.97.

On October 31, 1984, the Estate entered into an agreement with the J.W. Metz Lumber Company to reorganize the company's capital structure in hopes of countering economic difficulties the company was experiencing. Pursuant to that reorganization, the Estate was entitled to annually redeem preferred shares in the company to provide the Estate the funds for the annual payments of the deferred estate taxes. Despite the reorganization, the J.W. Metz Lumber Company continued to encounter economic difficulties throughout the remainder of 1984 and into 1985. On January 11, 1985, the company filed Chapter 11 bankruptcy, which later in the year was converted to a Chapter 7 bankruptcy. As a result of the company's bankruptcy, the Estate was unable to obtain the needed funds to pay the § 6166 installment payment which was due, December 11, 1985. The Estate has failed to make any further payments on its estate tax liability.

On December 2, 1985, the Executor petitioned for and received from the Probate Court a Decree of Final Settlement. That Decree found in pertinent part:

> The Court further finds that the Estate has been fully administered; that included among the assets of said Estate, and the principal asset

thereof, were 745 shares of common stock of J.W. Metz Lumber Company, a Colorado corporation, which constituted 50.3% of the voting stock of said corporation; that the federal estate tax return, Form 706, and the Kansas inheritance tax return, were duly filed and the Kansas inheritance tax was paid in full; that the executor duly elected to pay the federal estate tax attributable to the decedent's interest in the J.W. Metz Lumber Company on the installment basis pursuant to Section 6166 of the Internal Revenue Code; that the total of said tax shown as due on said return was $1,042,160.94, of which amount $699,185.77 was deferable [sic] as being attributable to the decedent's interest in J.W. Metz Lumber Company; that said deferred tax was payable in ten equal annual installments of $69,918.58 with the initial payment to be made on December 11, 1985; and that all of the nondeferrable tax in the amount of $342,975.17 and the annual interest installments to date on the deferred tax in the amount of $276,670.97 have been paid in full.

The Court further finds that pursuant to the order of this Court entered on October 26, 1984, after due notice to and review by the Internal Revenue Service, the executor, entered into a reorganization or recapitalization of J.W. Metz Lumber Company, as a means of offering the best chance for any value to be received by this Estate for its stock and the remaining interest in principal of its note from said corporation; that since said date said corporation was forced into a Chapter 7 bankruptcy proceeding (liquidation) and the Section 341 Meeting of Creditors originally scheduled for April 11, 1985, was continued to July 22, 1985; that although the executor duly filed a proof of claim, he was advised that the secured creditors had taken all of the property of said bankrupt and this Estate would

> therefore not receive any property from said bankruptcy proceeding; and that said Estate therefore has no property with which to make any further payments on said deferred portion of the federal estate tax or, ultimately, to the residuary beneficiaries under the terms of the will of the decedent.

On January 12, 1987, the Internal Revenue Service accelerated the deferred estate tax installments and demanded payment for the entire amount of estate taxes owed, plus penalties and interest.

The government claims statutory tax liens pursuant to 26 U.S.C. § 6321 and § 6324 on the residence at 16 Linden Drive, Wichita, Kansas. The government asserts that such liens arise from the estate tax liability of Mr. Metz. The § 6321 general tax lien against property of the Estate arose on February 16, 1981, the date the government assessed the Estate for estate taxes. The 6324 special estate tax lien against property of the Estate arose on March 11, 1980, the date Mr. Metz died. The government has not filed a Notice of Lien with the Sedgwick County Register of Deeds. The estate has not paid the entire federal estate tax liability reported on the federal estate tax return. As of December 17, 1986, the balance of assessed estate tax owed to the defendant was $850,908.86, plus additional amounts accruing after the dates of assessment. The government now seeks to foreclose its tax liens against the residence.

Jurisdiction

The defendant, in its motion for summary judgment, initially raised the issue of whether this court had

jurisdiction over the plaintiff's quiet title action. After the plaintiff briefed the issue in her response brief, the defendant conceded in its reply brief that this court does have jurisdiction. The court has reviewed the cases cited by the plaintiff, including *Estate of Johnson*, 836 F.2d 940 (5th Cir. 1988); *Aqua Bar & Lounge v. U.S. Depart. of Treasury*, 539 F.2d 935 (3rd Cir. 1976); *Rodriguez v. United States*, 629 F.Supp. 333 (N.D.Ill. 1986); and *Viva Ltd. v. United States*, 490 F.Supp. 1002 (D.Colo. 1980), and finds that since the plaintiff is not challenging the assessment of the tax but is only challenging the validity of the federal tax lien and sale, the court has jurisdiction over the quiet title action pursuant to 28 U.S.C. § 2410(a)(1) in combination with 28 U.S.C. § 1340 and 28 U.S.C. § 1331, notwithstanding the Anti-Injunction Act (26 U.S.C. § 7421) or the Declaratory Judgment Act (28 U.S.C. § 2201).

Plaintiff asks that this court quiet title in the residence free of any cloud of title from the tax liens asserted by the defendant. The defendant seeks a determination that the tax liens attached to the property pursuant to 26 U.S.C. § 6321 and 6324, and asks the court to allow foreclosure to collect the remaining tax liability of the estate.

Section 6321 is the general lien for taxes of all types. If a person who is liable to pay a tax refuses to pay the tax after demand has been made, a lien arises in favor of the government upon all personal and real property of that person. The estate of D. Otis Metz is the person liable to pay the tax. The lien under this section arises at the time the assessment is made and continues until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. The

assessment of tax liability in this case was made on February 16, 1981.

Equitable Conversion

The primary question before the court is whether the residence should be considered part of the gross estate of Mr. Metz under 26 U.S.C. § 6324. The general rule under § 6324(a)(1), is that a federal estate tax lien arises on the date of decedent's death on all of the gross estate of the decedent for ten years after the date of death unless the tax imposed is paid sooner or becomes unenforceable by reason of lapse of time. "The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." 26 U.S.C. § 2031(a). The estate tax lien attaches at the time of decedent's death without necessity for assessment or demand. *See Detroit Bank v. United States*, 317 U.S. 329, 332, 63 S. Ct. 297, 298, 87 L.Ed. 304 (1943). The defendant argues that upon Mr. Metz's death, the residence simply passed to the plaintiff by way of the decedent's will. The plaintiff argues that she obtained equitable title to the residence before Mr. Metz died by virtue of her contract with him, and therefore the residence was not property of the estate to which a tax lien could attach. The court must look to state law to determine the nature of the legal interest the taxpayer had in the property. *See Viva*, 490 F.Supp. at 1005.

The plaintiff argues that equitable title passed to her before Mr. Metz's death through the doctrine of equitable conversion. The plaintiff cites *Frisbie, Executor v. Director*

of Taxation, 1 Kan.App.2d 416, 566 P.2d 29 (1977) in support of this argument. The court finds that case to be distinguishable from the case at bar. *Frisbie* involved a situation where the decedent had entered into a real estate sales contract before her death in which she agreed to sell land to Ray Frisbie. Frisbie took possession of the land, paid the real estate taxes, and made principal and interest payments as they became due. A deed to Frisbie's family corporation was placed in escrow along with the contract. 1 Kan.App.2d at 416. At the time of the decedent's death, Frisbie still owed $75,400. The question which arose in *Frisbie* was whether the trial court had erred in finding that the decedent's interest in the contract to sell real estate should be considered a personal property interest or as an interest in real estate for purposes of applying Kansas inheritance tax. *Id.* The trial court considered it to be a personal property interest, and the Kansas Court of Appeals affirmed, finding the Kansas Supreme Court case of *In re Estate of Hills*, 222 Kan. 231, 564 P.2d 462 (1977) to be controlling. 1 Kan.App.2d at 420. *Hills* also involved a contract for the sale of real estate. The seller died before all the payments were made under the installment purchase agreement. The issue before the court was whether the contract passed under the seller's will as real estate or as personal property. 222 Kan. at 231. The Supreme Court discussed the general rule of equitable conversion, noting that the doctrine involves a change in the character of property, so that under certain circumstances realty is considered as personalty and personalty is considered as realty. The court further noted:

> 'The equitable principle that the interest of the vendor under an executory land contract is to be regarded as personalty has been frequently

> applied in the distribution of a deceased vendor's estate; accordingly, it is held that the vendor's interest in the land which he has contracted to sell passes to his personal representative as personalty, together with the right to the unpaid purchase money and securities therefor. . . . '

222 Kan. at 238 (quoting 77 Am.Jur.2d, *Vendor and Purchaser* § 320, pp. 481-482). The case presently before this court does not involve an installment purchase agreement for the sale of real estate, and the holdings in *Hills* and *Frisbie* are not applicable.

The plaintiff advances a second line of cases in support of her argument that equitable title passed to her before Mr. Metz's death and therefore federal tax liens could not attach to the residence. These cases involve situations in which the decedent promised to devise property to the plaintiff in his or her will in exchange for services to be performed by the plaintiff for the decedent during decedent's lifetime. In these cases the services were performed but the property was not devised to the plaintiff as promised. The Kansas Supreme Court applied the doctrine of specific performance to carry out the terms of the agreement. *See In re Estate of Billinger*, 208 Kan. 327, 491 P.2d 924 (1971); *Dillon v. Gray*, 87 Kan. 129, 123 Pac. 878 (1912); *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846 (1909). The present case can be distinguished from this line of cases. In the present case the decedent fulfilled his promise by devising the residence to the plaintiff in his will. There is no need for specific performance. The legal interest in the realty passed to the plaintiff as a beneficiary under Mr. Metz's will. Until then, Mr. Metz owned the entire interest.

Plaintiff's Status as Purchaser

The plaintiff's next argument is that the tax liens are invalid because of her status as a purchaser. She believes that as a purchaser, the residence was divested of the federal estate tax lien pursuant to 26 U.S.C. § 6324(a)(2). A purchaser is "a person who, for adequate and full consideration in money or money's worth . . . acquires an interest . . . in property which is valid under local law against subsequent purchasers without actual notice." 26 C.F.R. § 301.6323(h)-1(f)(1). "Adequate and full consideration in money or money's worth" means "a consideration in money or money's worth having a reasonable relationship to the true value of the interest in property acquired." 26 C.F.R. § 301.6323(h)-1(f)(3). "Money or money's worth," means "money, a security . . . tangible or intangible property, services, and other consideration reducible to a money value." 26 C.F.R. § 301.6323(h)-1(a)(3). The plaintiff argues that she acquired an interest in the residence by paying adequate and full consideration (the services she rendered to Mr. Metz during the last 3 1/2 years of his life) under the executory contract she entered into prior to Mr. Metz's death and therefore prior to the effective date of the lien. The defendant argues that the house was worth $250,000 at the time and that the plaintiff has not shown how her service to Mr. Metz has a reasonable relationship to the true value of the interest in the property she acquired. The court finds it unnecessary to make a determination as to whether the service provided was adequate and full consideration. The plaintiff is clearly not a purchaser who has an interest which is divested of the lien under 26 U.S.C. § 6324(a)(2), since her interest was not transferred to her

by a spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary who received, or had on the date of decedent's death, property included in the gross estate of the decedent.

Plaintiff's Status as Transferee

The plaintiff next argues that she is not a transferee under 26 U.S.C. § 6324(a)(2), who received, or had on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, and therefore she is not personally liable for the tax. The defendant does not address this issue in its brief. The court agrees with the plaintiff that she is not personally liable for the tax. However, the house was properly included in the gross estate of Mr. Metz and the house is subject to foreclosure in order to satisfy the remaining tax liability of the estate.

Equitable Considerations

The last argument advanced by plaintiff is that the tax lien should be discharged because that portion of the estate tax attributable to the residence has already been paid. The defendant argues that the liens under 26 U.S.C. § 6321 and 6324 attach to *all* assets of the estate and remain until the entire estate tax liability is satisfied. The defendant further argues that there is no basis in the Internal Revenue Code for discharging certain assets from the liens simply because the portion of estate tax attributable to the value of those assets has been paid. In support of her argument that the tax lien against the residence should be discharged, the plaintiff points to the

limited degree of judicial discretion this court has under 26 U.S.C. § 7403 to decree a sale of the property to satisfy the remaining tax liability. The plaintiff asks the court to exercise its equity powers to preclude foreclosure of the tax liens because of the inequitable and irreparable harm to her and her two children, citing *United States v. Rodgers*, 461 U.S. 677, 103 S. Ct. 2132, 76 L.Ed.2d 236 (1983), in support. *Rodgers* and its companion case involved situations in which a delinquent taxpayer shared his ownership interest in jointly-owned property with other people rather than being the sole owner. 76 L.Ed.2d at 251. The Supreme Court found that the government's tax lien could not extend beyond the delinquent taxpayer's interest in the property, but that the government could order a sale of the property as a whole and obtain its rightful share of the proceeds. 76 L.Ed.2d at 251-253. The Supreme Court went on to note however, that compensation to the nondelinquent joint owner for his share of the proceeds after a forced sale "may not always be a completely adequate substitute for a roof over one's head." 76 L.Ed.2d at 260. The court found that the language of § 7403 gave the district court a limited amount of judicial discretion to refuse to authorize a forced sale in a particular case. 76 L.Ed.2d at 261. This court finds however, that the holding in *Rodgers* is limited to joint-ownership situations, and that it need not apply the equitable assessment set out in *Rodgers* to the facts of this case, as there is no separate interest to which the tax liability does not extend. Although the result of this ruling is tragic, the court cannot exercise its equitable powers in general to prevent the government from

enforcing its tax lien through a judicial sale pursuant to § 7403.

IT IS THEREFORE ORDERED that plaintiff's request for oral argument is denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is granted.

Dated this 13th day of October, 1989, at Wichita, Kansas.

/s/ Sam A. Crow
Sam A. Crow, U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JANET METZ,

Plaintiff

Vs. No. 88-1271-C

UNITED STATES OF AMERICA,

Defendant

MEMORANDUM AND ORDER
(Filed Feb 5, 1990)

This case comes before the court on plaintiff's motion to alter or amend the judgment entered against her on October 13, 1989. A motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) is essentially a motion for reconsideration. *See, e.g., Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989). A motion for reconsideration is the opportunity for the court to correct manifest errors of law or fact and to review newly discovered evidence. *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 2995 (1986).

The plaintiff begins her motion by "revisiting" the arguments she has already made in her summary judgment motion and in her opposition to the government's cross-motion for summary judgment concerning the issue of equitable conversion. The plaintiff apparently feels that the court misunderstood her entire argument on this point. The court understood the argument when it was first presented, and the plaintiff's motion to alter or amend does not state the argument any more "cogently" than before. The court has once again reviewed the facts and the relevant case law, including, but not limited to, *In*

re Estate of Hills, 222 Kan. 231, 564 P.2d 462 (1977), *Frisbie, Executor v. Director of Taxation*, 1 Kan. App. 2d 416, 566 P.2d 29 (1977), *In re Estate of Billinger*, 208 Kan. 327, 491 P.2d 924 (1971), and *Reed v. Commissioner*, 36 F.2d 867 (5th Cir. 1930). The court has also reviewed the plaintiff's citation to 3 *American Law of Property* § 11.19. The court is not convinced that it made manifest errors of law in deciding that the decedent retained the entire interest in the house before his death and that the house was properly considered as part of the decedent's gross estate under 26 U.S.C. § 6324.

The plaintiff's second argument in support of her motion to alter or amend is that the court mistakenly overlooked her argument that any lien against the house was divested because her right to receive the house constituted a charge against the estate under 26 U.S.C. § 6324(a)(1). The plaintiff mistakenly overlooked the need to provide the court with a page citation to either her motion for summary judgment or her motion in opposition to the government's motion for summary judgment where she made this argument. The court has reviewed the plaintiff's prior motions, and even with the aid of plaintiff's "Table of Authorities," the court cannot find where plaintiff made more than a reference to the statutory language of § 6324(a)(1). The simple fact is that the plaintiff never made the argument that her contract with the decedent constituted a charge against the estate. A party cannot wait until a motion for reconsideration to advance new legal theories that were available for argument at the time of the summary judgment briefing process. *See Butler v. Sentry Ins. A. Mut. Co.*, 640 F. Supp. 806,

812 (N.D. Ill. 1986). The court denies plaintiff's motion to alter or amend the judgment.

The court also has before it the government's motion for order of sale, an order for sale, plaintiff's reply in opposition to government's motion for order of sale, and plaintiff's motion for stay of execution pending disposition of her motion to alter or amend. The plaintiff's motion for stay is mooted by this decision. However, the court will not sign the government's order for sale until 20 days from the date of this order have passed, in anticipation of plaintiff filing a notice of appeal and a motion for a stay of execution of judgment upon appeal.

IT IS THEREFORE ORDERED that plaintiff's motion to alter or amend the judgment entered against her on October 13, 1989, is denied.

Dated this 5th day of February 1990, at Wichita, Kansas.

/s/ Sam A. Crow
Sam A. Crow, U.S. District Judge

KANSAS STATUTES ANNOTATED
(1979 Session Laws of Kansas, Ch. 181)

ARTICLE 32. UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

§ 60-3201. Power to Answer

The Kansas supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state.

§ 60-3202. Method of Invoking

This act may be invoked by an order of any of the courts referred to in K.S.A. 60-3201 upon the court's own motion or upon the motion of any party to the cause.

§ 60-3203. Contents of Certification Order

A certification order shall set forth the questions of law to be answered and a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§ 60-3204. Preparation of Certification Order

The certification order shall be prepared by the certifying court, signed by the judge or justice presiding at the hearing, and forwarded to the Kansas supreme court by the clerk or the certifying court under its official seal. The Kansas supreme court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of such court, the record or portion thereof may be necessary in answering the questions. The proceedings in the Kansas supreme court shall have precedence over all other hearings therein, except those of like character.

§ 60-3205. Costs of Certification

Fees and costs shall be the same as in civil appeals docketed before the Kansas supreme court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 60-3206. Briefs and Argument

Proceedings in the Kansas supreme court shall be those provided in the court's rules and statutes governing briefs and arguments.

§ 60-3207. Opinion

The written opinion of the Kansas supreme court stating the law governing the questions certified shall be sent by the clerk under the seal of the court to the certifying court and to the parties.

§ 60-3208. Power to Certify

The supreme court or the court of appeals of this state, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

§ 60-3209. Procedure on Certifying

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

§ 60-3210. Severability

If any provision of this act or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

§ 60-3211. Construction

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 60-3212. Short Title

This act may be cited as the uniform certification of questions of law act.

TENTH CIRCUIT LOCAL RULE

RULE 27

MOTIONS

27.1. **Certification of Questions of State Law.** When the rules of the highest court of a state provide for certification by a federal court of questions arising under the laws of that state which may control the outcome of a case pending in the federal court, this court may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. Certification may be upon motion or upon the court's order. A request for certification must be made by separate motion, filed contemporaneously with the moving party's brief on the merits.

26 U.S.C. § 6324

§ 6324. Special liens for estate and gift taxes

(a) Liens for estate tax. – Except as otherwise provided in subsection (c) –

> **(1) Upon gross estate.** – Unless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.
>
> **(2) Liability of transferees and others.** – If the estate tax imposed by chapter 11 is not paid when due, then the spouse, transferee, trustee (except the trustee of an employees' trust which meets the requirements of section 401(a)), surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property transferred by (or transferred by a transferee of) such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, to a purchaser or holder of a security interest shall be divested of the lien provided in paragraph (1) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, or transferee of any such person,

except any part transferred to a purchaser or a holder of a security interest.

(3) Continuance after discharge of fiduciary. – The provisions of section 2204 (relating to discharge of fiduciary from personal liability) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless such part of the gross estate (or any interest therein) has been transferred to a purchaser or a holder of a security interest, in which case such part (or such interest) shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser or holder of a security interest, by the heirs, legatees, devisees, or distributees.

(b) Lien for gift tax. – Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift. Any part of the property comprised in the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest shall be divested of the lien imposed by this subsection and such lien, to the extent of the value of such gift, shall attach to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest.

(c) Exceptions. –

(1) The lien imposed by subsection (a) or (b) shall not be valid as against a mechanic's lienor and, subject to the conditions provided by section 6323(b) (relating to protection for certain interests even though noticed filed), shall not be valid with respect to any lien or interest described in section 6323(b).

(2) If a lien imposed by subsection (a) or (b) is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to any item described in section 6323(e) (relating to priority of interest and expenses) to the extent that, under local law, such item has the same priority as the lien or security interest to which it relates.

26 U.S.C. §§ 2033, 2036 & 2037

§ 2033. Property in which the decedent had an interest

The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

§ 2036. Transfers with retained life estate

(a) General rule. – The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death –

(1) the possession or enjoyment of, or the right to the income from, the property, or

(2) the right, either alone or in conjunction with any person to designate the persons who shall possess or enjoy the property or the income therefrom.

. . . .

§ 2037. Transfers taking effect at death

(a) General rule. – The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of

a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if –

> (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and
>
> (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

. . . .

Sec. 1, Ch. 357, Laws of Kansas, 1915

SECTION 1. All property, corporeal or incorporeal, and any interest therein within the jurisdiction of the state, whether belonging to the inhabitants of the state or not, which shall pass by will or by the laws regulating intestate succession, or by deed, grant or gift made in contemplation of death, or made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust – except in case of a *bona fide* purchase for full consideration in money or money's worth:

. . . .

shall be taxed as herein provided:

K.S.A. 79-1547 (1978)

79-1547. Same; property in which decedent had an interest at death. The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his or her death.

(2)

No. 91-260

Supreme Court, U.S.
FILED
OCT 10 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JANET T. METZ, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether, under Kansas law, a house owned by decedent at the time of his death and bequeathed by him to petitioner in exchange for her care for him during his lifetime is included within his gross estate for federal tax purposes and is therefore subject to the federal estate tax lien.

2. Whether the court of appeals abused its discretion in denying petitioner's post-appeal motion to certify a state law question to the Kansas Supreme Court.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-260

JANET T. METZ, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 933 F.2d 802. The opinions of the district court (Pet. App. A14-A29, A30-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1991. A petition for rehearing and a motion to certify question of law to the Supreme Court of the State of Kansas were denied on July 5, 1991 (Pet. App. A13). The petition for a writ of certiorari was filed on August 12, 1991. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[1]

[1] Petitioner erroneously cites 28 U.S.C. 1257(3) (1982) (certiorari from state courts) as the jurisdictional basis for certiorari. This section no longer exists, having been revised

STATEMENT

1. In October 1976, petitioner was living in California when she was contacted by D. Otis Metz, the grandfather of her ex-husband. Mr. Metz offered to add a codicil to his will to leave his house in Wichita, Kansas, to petitioner upon his death if "she would return from California with her daughters and move into my home in Wichita, Kansas, to help care for me and my needs so long as I shall live" (Pet. App. A17). Mr. Metz was then 91 years old (*id.* at A3).

Petitioner accepted the offer, sold her house in California, and moved into Mr. Metz's house in Wichita. On November 29, 1976, Mr. Metz executed a codicil to his will to leave the residence to petitioner upon his death. His stated reasons for doing so were his "great love and affection" for her, her relationship to him as the mother of his great-grandchildren, her assistance to his wife in her last illness, and their mutual contractual obligations (Pet. App. A17). Petitioner lived with Mr. Metz at his home in Wichita until his death on March 11, 1980 (*id.* at A16).

The assets of Mr. Metz's estate were valued at $2,986,275.01, which included the Wichita residence, valued at $250,000 (Pet. App. A3-A4). On February 16, 1981, the Internal Revenue Service assessed estate taxes in the amount of $1,042,150.94, which gave rise to a lien for estate taxes on all the property in the estate. The estate made a partial payment of $342,975, and elected, pursuant to 26 U.S.C. 6166, to defer payment of the remaining $699,185.77. The deferred amount was to be paid in ten equal annual installments of $69,918.58, beginning December 11,

---

and recodified as 28 U.S.C. 1257(a) by Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662.

1985. From 1981 to 1985, the estate made annual interest payments to the IRS, aggregating $276,670.97, but paid none of the principal owed on the tax liability (Pet. App. A4, A19). In 1985, the probate court authorized distribution of the Wichita residence to petitioner even though it determined that the estate had no other property with which to make payments on the deferred portion of the federal estate tax (*ibid.*).

On January 12, 1987, the IRS accelerated the deferred estate tax payments and demanded the entire amount owed plus penalties and interest (Pet. App. A5). Petitioner then commenced the present action to quiet title in the Wichita residence. The government counterclaimed and sought foreclosure of the estate tax lien (*id.* at A14).

2. In the district court, petitioner contended (Pet. App. A2) that, under Kansas law, she became the equitable owner of the residence in October, 1976, when she agreed to take care of Mr. Metz for life. She therefore asserted that Mr. Metz held only legal title for her benefit and that the estate tax lien did not attach to the residence. The court held, however, that, under Kansas law, the contract between petitioner and Mr. Metz was not enforceable until Mr. Metz's death. Because he held valid legal title at his death, the house was properly included in his gross estate and was therefore subject to the estate tax lien (*ibid.*). Petitioner made no effort to obtain certification of the state law question in the district court.

3. The court of appeals affirmed. The court held that, under Kansas law, the transfer of property by will in exchange for lifetime service does not transfer title when the contract is made and that the transfer of the owner's interest in property occurs only when

the contract is completed by the death of the owner (Pet. App. A8). In reaching this conclusion, the court relied on *State* v. *Mollier*, 96 Kan. 514, 152 P. 771 (1915), in which the Supreme Court of Kansas held that property devised in exchange for lifetime care provided to the decedent was subject to the Kansas inheritance tax (Pet. App. A8-A10). While the Kansas statute in effect at the time *Mollier* was decided was repealed in 1978, the court concluded that the rationale of *Mollier* still applies under Kansas law (*id.* at A10).

4. After the court of appeals entered its decision, petitioner filed a petition for rehearing and a motion to certify the question of state law to the Supreme Court of the State of Kansas. The court of appeals denied the petition for rehearing and the motion to certify without opinion (Pet. App. A13).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The federal estate tax lien applies to all property—whether real, personal, tangible or intangible—in which the decedent owned an interest at the time of his death. 26 U.S.C. 2031(a), 2033, 6324(a). The federal estate tax lien attached to the Wichita residence because, under Kansas law, Mr. Metz was the owner of the residence at the time of his death. *State* v. *Mollier*, 96 Kan. at 518, 152 P. at 772. In *Mollier*, a niece inherited her uncle's property after performing an agreement to reside with him and care for him as long as he lived. The niece argued that the property was not subject to the Kansas inheritance

tax because she had acquired the property pursuant to a contract which she had fully performed when the will took effect. She claimed that the will was merely the means for conveying to her the legal title to property that had already become hers when her uncle died. The Supreme Court of Kansas rejected this argument, holding that Kansas law taxed all property passing by will, rather than by deed or grant. The court noted that, while a contract to devise real estate in consideration for lifetime services "would in a proper case be enforced in equity, the property itself was subject to probate as belonging to the deceased at the time of his death, and was liable for his debts, and * * * these were a lien upon the property prior to any rights of the promisee." *Ibid.*

Although the Kansas estate tax statute then in existence was repealed in 1978, the court of appeals correctly held that the rationale of *Mollier* is still applicable to this case. In 1976, when petitioner agreed to care for Mr. Metz, she acquired, at most, "a vested interest, subject to being defeated by her nonperformance" (*State* v. *Mollier*, 96 Kan. at 519, 152 P. at 773).[2] See *Corbin on Contracts* § 21 (1952). Because Mr. Metz continued to own the property until his death, the federal tax lien attached to the residence.

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[2] The court of appeals correctly observed (Pet. App. A10) that current Kansas inheritance tax law also manifests an intent to tax all property of the decedent. See Kan. Stat. Ann. § 79-1547 (1989) (gross estate includes "all property to the extent of the interest therein of the decedent at the time of his or her death"); *id.* § 79-1551 (gross estate includes property where possession or enjoyment can be obtained only by surviving the decedent and the decedent retained a reversionary interest). See also *In re Estate of Saroff*, 229 Kan. 446, 625 P.2d 458 (1981).

Petitioner errs in contending (Pet. 18, 21) that Kansas rejected the rule of *Mollier* in *Frisbie* v. *Director of Taxation*, 1 Kan. App. 2d 416, 566 P.2d 29 (1977). In *Frisbie*, a Kansas appellate court held that the seller's interest in real estate subject to an installment sale was equitably converted into personalty in certain limited circumstances. An installment contract for the sale of real estate is not analogous to a contract for lifetime services. Moreover, petitioner errs in suggesting (Pet. 18) that a decision of an intermediate appellate court could impliedly overrule the decision of the Kansas Supreme Court in *Mollier*.

In any event, petitioner's contentions concerning Kansas law do not warrant this Court's review.

2. The denial of a motion to certify is reviewable only for abuse of discretion. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974). Certification is not obligatory, even when there is genuine doubt as to local law. *Id.* at 390-391.

The court of appeals did not abuse its discretion in denying petitioner's belated motion to certify. Tenth Circuit Local Rule 27.1 requires that a request for certification be "filed contemporaneously with the moving party's brief on the merits." The motion to certify in this case was made only *after* the court of appeals' decision and was therefore untimely. See *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *New Mexico ex rel. Reynolds* v. *Molybdenum Corp. of America*, 570 F.2d 1364, 1367 (10th Cir. 1978). Moreover, the decision of the Kansas Supreme Court in *State* v. *Mollier* is factually indistinguishable from the present case. Since the Supreme Court of Kansas has provided a definitive an-

swer to the question presented in this case, resort to the certification procedure would not have been appropriate.[3] Although petitioner claims (Pet. 16-17) that *Mollier* is outdated, and that the Supreme Court of Kansas would now reach a different result, she cites no relevant Kansas authority in support of her position.[4]

---

[3] Even if the criteria for certification are less stringent in the Fifth Circuit than in other courts of appeals, as petitioner seems to argue (Pet. 11), there is no basis to conclude that the Fifth Circuit would have granted certification in this case. In *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), cert. denied, 429 U.S. 829 (1976), the court of apeals declined to certify a question of state law when the question was not one "in which we are required to 'guess' state law from one or two questionable precedents." 526 F.2d at 275.

[4] Petitioner relies (Pet. 17 n.5) on decisions of other jurisdictions that are distinguishable from the present case. *In re Estate of McLeod*, 105 Wash. 2d 809, 719 P.2d 88 (1986), involved a lifetime services contract similar to that present here, but there was no question in that case whether the property should be included in the gross estate. The question presented, and answered in the affirmative, was whether the obligation to bequeath the property as consideration for the services performed was deductible from the value of that estate as a debt of the decedent. The case of *In re Estate of Vai*, 65 Cal. 2d 144, 417 P.2d 161 (1966), did not involve a contract for lifetime services, but a property settlement agreement in which the husband agreed with his estranged wife to provide in his will for the lifetime support of their daughter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-260

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October Term, 1991

JANET METZ,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONER

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In The

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JANET METZ,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONER

The brief for the United States in opposition is as vulnerable for what it does not say as for what it does say.

The United States does not disagree with Professor Moore's observation that *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), provides "little guidance" as to when state law certification procedures should be used or the factors to be considered. 1A Moore's Federal Practice, Sec. 0.203[5], p. 2159 (Second Edition, 1991). Nor does the United States take exception to the widespread conflict, confusion and lack of uniform standards afflicting federal courts in deciding whether to certify state law issues to

appropriate state appellate courts, under the procedures now available from nearly all the states. (Petition at 9-13).

Moreover, the United States does not deny that the court of appeals decided the determinative issue of state property law by relying upon *State v. Mollier*, 96 Kan. 514, 152 P. 771 (1915), which neither the parties nor the district court had cited or discussed, in either district court or appellate proceedings. Nor does the United States deny that on appeal, instead of relying on *Mollier*, it changed its position to invoke tax code sections 2036 and 2037 which it had specifically disclaimed as inapplicable, at the district court level.

The United States also cannot deny that a certification to the Kansas Supreme Court would be expeditious and provide a definitive answer to an important state property law issue which will often recur in future cases, including federal tax cases which can only be decided by federal courts. This is not a diversity case which plaintiff could have filed in state court. Nor does the United States deny that if Kansas recognizes an equitable property interest in petitioner at the time of Mr. Metz' death, the government's estate tax lien does not attach to that interest. (Petition at 14).

What the United States *does* say seeks to justify the court of appeals' refusal to certify the governing state property law issue, on grounds that (1) "[t]he decision of the court of appeals is correct", and (2) that petitioner's motion to certify was "untimely". (Br. in Opp. at 4, 6). On these points the government's analysis is seriously flawed.

As in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), petitioner here did not file a motion for certification until a petition for rehearing was filed. This Court rejected respondents' attempt in *Lehman* to preclude consideration of the certification process on this ground – with the result that the court of appeals on remand did make a certification, which resulted in a state court ruling disagreeing with the original federal appellate decision.

In the present case, petitioner relied on recent Kansas decisions accepting the general rule of equitable conversion and had no reason to foresee the appellate court's *sua sponte* application of the 1915 *Mollier* decision which was neither in point nor was any longer the law. The need for certification to the Kansas Supreme Court, in short, became evident only when the court of appeals went outside the bounds of the case presented to it by the litigants. It is especially in such a case that a federal court should explicitly consider certification to the state court. Tenth Circuit Rule 27.1 permits certification "upon motion or upon the court's order." (Petition at A37). When the court *sua sponte* creates the need for certification, the court should be obliged to consider certification *sua sponte*, as well as on a party's motion filed in response to the court's own archaeological exploration of dated and repealed state laws.

The United States also misconstrues *Mollier* and misstate's petitioner's position regarding it. *Mollier* is not merely an obsolete decision construing a repealed statute. Before the old Kansas inheritance tax statute was repealed in 1978, the Supreme Court of Kansas held that its cases showed a "clear trend to follow the general rule of law and apply equitable conversion" (In re *Estate of*

Hills, 222 Kan. 231, 238, 564 P.2d 462, 468 (1977); followed in an estate tax case, *Frisbie v. Director of Taxation*, 1 Kan. App.2d 416, 566 P.2d 29 (1977)). Accordingly, *Mollier's* rejection in 1915 of the doctrine of equitable conversion as a basis for avoiding the inheritance tax was no longer law in Kansas under the old statute. But even more critical is the other difference – ignored by the United States – that *Mollier* merely rejected equitable conversion as a reason for avoiding the Kansas inheritance tax imposed on a transfer of legal title by will. It did not pretend to hold that the woman who had earned the home, legal title to which was transferred to her by will, did not have an equitable property interest vested when the testator died. *Mollier* recognized she had a vested property interest, but that the title transfer was nonetheless taxable:

> " . . . Conceding that years before the statute was enacted *the defendant acquired a vested interest*, subject to being defeated by her nonperformance, this right was acquired subject to the power of the state to regulate the transmission of property in the manner provided in the contract . . . The fact is that the particular method chosen [transfer of title by will] . . . called for a transaction which the legislature has declared shall be taxed . . .
>
> "It has been universally held by the courts that statutes of this character impose a tax *not upon the property but upon the succession, the right to take the property by will* . . . " (96 Kan. at 519, 152 P. at 773) (Our emphasis).

The foregoing demonstrates that the old Kansas statute taxed transfer of *legal title* to property pursuant to a

will – that *Mollier* did not purport to hold that one who earned real property by a services contract did not have a vested equitable property interest in it. Kansas did not then and does not now hold that one who earns property by the sweat of one's brow is in an inferior position to one who merely pays cold cash. Yet this is the real effect of the court of appeals' decision and the government's position in this Court.[1]

The United States disingenuously bootstraps its inequitable position by quoting out of context from a portion

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[1] Needless to say, the state inheritance tax in *Mollier* was a very small percentage. Here, petitioner's federal government would take the entire home from her, vested equitable interest and all.

The government also misapprehends the California and Washington cases overruling their *Mollier*-era estate tax cases. (Br. in Opp. at 7, note 4). The recent cases overrule the state taxability of legal title transfers by will, and permit taxation only of the equitable ownership, under the old inheritance tax statutes like that construed by *Mollier* in Kansas. (Petition at 17, note 5). *Frisbie v. Director of Taxation*, 1 Kan.App.2d 416, 566 P.2d 29 (1977), is consistent with the new line of cases. *Frisbie* thus applied the general rule of equitable conversion as required by the Kansas Supreme Court. *In re Estate of Hills*, 222 Kan. 231, 564 P.2d 462 (1977).

The government's suggestion that petitioner had a unilateral contract creating a reversionary interest in Mr. Metz until his death (Br. in Opp. at 5) is contrary to fact. Petitioner signed a bilateral written contract committing her to perform for the rest of Mr. Metz' life. (Exs. B and D to Petitioner's Motion for Summary Judgment). Thus, Mr. Metz held no reversionary interest under either Kansas law or federal estate tax law. (See 26 U.S.C. § 2037, Petition at A41, which statute the government considered to be inapplicable in the district court. (Petition at 7, note 2).

of the *Mollier* opinion, (Br. in Opp. at 5), without pointing out that the quotation purports to describe, not the *Mollier* case, but the holding of an earlier Kansas case, *Schoonover v. Schoonover*, 86 Kan. 487, 121 P. 485 (1912). The state contended in *Mollier* that *Schoonover* held that real property devised pursuant to contract remained property of the deceased and was liable for his debts – a nonexistent holding as a casual reading of *Schoonover* demonstrates. Since Petitioner described this aberration (Petition at 15, footnote 4), the government's present quotation from a demonstrably wrong description of *Schoonover's* holding, without even mentioning *Schoonover* anywhere in its brief, appears to be deliberate. The court of appeals also quoted the purported holding of *Schoonover*, including the named reference to that opinion, but without realizing that *Schoonover* held no such thing.[2]

The present Kansas estate tax statute, K.S.A. 79-1547, is patterned after the federal estate tax statute, in taxing the value of all property "to the extent of the interest therein of the decedent at the time of his or her death." (Petition at A43). An equitable property interest is not includable in such an estate for tax purposes although the estate may hold legal title. (Petition at 14). The general

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[2] Petition at A9. The government also misstates the district court's holding by saying the district court held that petitioner's contract was not enforceable until after Mr. Metz' death. (Br. in Opp. at 3). The district court, conceding its enforceability, held that the right to specific performance was irrelevant because Mr. Metz complied with the contract by executing a codicil. (Petition at A25). But it is the *right* to specific performance which gives rise to equitable conversion – not the necessity to exercise that right in court. (Petition at 5-7).

rule of equitable conversion is that one performing a services contract becomes equitable owner of the property as surely as does one paying money under an installment contract. Kansas follows the general rule. (Petition at 6-7).

Petitioner agreed to uproot her family to perform a difficult services contract for the rest of Mr. Metz' life – a period which turned out to be four years – a contract she accepted only when assured by Mr. Metz' Kansas lawyer that it was specifically enforceable. Kansas indeed does specifically enforce such contracts; and accepts the general rule of law applying equitable conversion. That general rule does not invidiously discriminate between those performing services, and those paying money, for land. The lower court's legalistic rationalization misconstruing a 1915 Kansas case dealing with a repealed statute in order to legitimize that discrimination amounts to judicial arrogance antithetical to that "cooperative judicial federalism" needed to cement our federal union of states. Stripped of legalistic pretense, the government's position reminds one of the emperor and his clothes, of whom the young child exclaimed, "But he's naked".

CONCLUSION

Lehman Brothers v. Schein, 416 U.S. 386 (1974), pointed the way for federal court certification of state law issues. Today nearly all states permit certification. The considerations which led this Court to review the court of appeals' failure to consider certification in *Lehman* are now far more compelling. Only this Court's guidance in

the form of uniform factors to be considered, in order to test the propriety of certification, will solve the conflict and lack of uniformity in this new and growing area of federal procedural law.

The petition should be granted.

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